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Issue Date: 20 August 2004.....

In the Matter of:

ANTHONY F. GONZALEZ,
Complainant,

Case No. 2004-SOX-39

v.

COLONIAL BANK,
Respondent.

&
THE COLONIAL BANCGROUP. INC.,

Respondent.
.....

ORDER DENYING MOTION FOR SUMMARY DECISION

Respondent, Colonial Bank, moves for summary decision in this claim filed under § 806 of the Sarbanes-Oxley Act ("Act") by Complainant, Anthony F. Gonzalez.[1] Respondent presents two reasons for summary decision being granted in its favor: 1) Colonial Bank is not a publicly traded company and Section 1514A of the Act provides whistleblower protection only to employees of a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934; and 2) The undisputed facts establish that Respondent did not fire Complainant in retaliation for activity protected by § 806 of the Act. Complainant filed an *Answer In Opposition To Motion For Summary Decision* on July 16, 2004. [2]

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d), which provides:

> The administrative law judge may enter summary decision for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters

[1] Respondent's motion was filed on June 15, 2004.

[2] Respondent filed a Notice of Supplemental Authority on July 20, 2004. Complainant moved to strike the notice by motion dated July 30, 2004, because it was filed contrary to a May 19, 2004 Scheduling Order which precludes the filing of a reply brief unless "leave is granted for good cause shown." Respondent replied that the purpose of the notice was to inform the tribunal of recent decisions under the Sarbanes-Oxley Act. Complainant is correct that notice was filed contrary to the scheduling order, as leave should have been requested. Nevertheless, the notice and the resulting motion to strike are inconsequential to the present decision as this tribunal was aware of the referenced decisions prior to receipt of the notice. (The July 7, 2004 Whistleblower Newsletter referenced by the Respondent as the source of four of the cases was issued under the name of the undersigned.)

officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

29 C.F.R. § 18.40(d). *See, e.g., Stauffer v. Wal Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-21 (ARB Nov. 30, 1999) (under the Act and pursuant to 29 C.F.R. § 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); *Webb v. Carolina Power & Light Co.*, Case No. 1993-ERA-42, at 4-6 (Sec'y July 17, 1995).

This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to grant a summary decision for either party where "there is no genuine issue as to any material fact and a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Prosecuting Party), and Respondent must be entitled to prevail as a matter of law. *Gillilan v. Tennessee Valley Authority*, Case Nos. 1991-ERA-31 and 1991-ERA-34, at 3 (Sec'y August 28, 1995); *Stauffer, supra*.

Publicly Traded Company

Respondent, Colonial Bank, argues that the present complaint must be dismissed because Complainant is not an employee of a publicly traded company, and §1514A of the Act provides whistleblower protection only for employees of publicly traded companies who report security fraud.[3]

[3] 18 U.S.C. § 1514A provides: No company with a class of securities registered under § 12 of the Security Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under § 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and condition of employment because of any lawful act done by the employee:

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
>
> > (A) a Federal regulatory or law enforcement agency;
> >
> > (B) any Member of Congress or any committee of Congress; or
> >
> > (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

Subsequent to Respondent's filing its motion for summary decision, Complainant moved that the complaint be amended by the addition of an additional respondent, Respondent's parent company, The Colonial BancGroup, Inc. The motion alleged that The Colonial BancGroup, Inc. should be added as a respondent because it had shared management and function with Colonial and because its own actions "affected" the Complainant's employment, contrary to the protection provided Complainant by the Act. *See* 29 C.F.R. § 1980.101. Complainant's motion was granted by Order dated August 17, 2004. Thus, the issue raised by the present motion for summary decision is whether the Complainant falls within the protection of the Act when his employer is a non-publicly traded company but is a subsidiary of a publicly traded company that is asserted to have joint responsibility for the Complainant's termination, and has been named as a respondent.

Three administrative law judges have recently ruled on similar issues. In *Morefield v. Exelon Serevices, Inc. and Exelon Corporation*, 2004-SOX-00002 (ALJ Order Jan 28, 2004), the Judge framed the issue to be whether the whistleblower provisions of the Act are available to a complainant who was not an employee of a public related company, but rather worked for a subsidiary of a public traded company. He answered in the positive. He considered the purpose of the Act, and opined that it would not serve the Act's purpose to take "too pinched a view of this remedial statute." He reasoned that subsidiaries are an integral part of a publicly traded company, inseparable for purposes of evaluating the integrity of its financial information, and he noted that the Act requires that subsidiaries be subject to internal accounting controls. He also considered that the Act enhanced the role of the audit committee by requiring, *inter alia*, that they establish procedures for the treatment of anonymous submissions by employees regarding questionable accounting or auditing matters. He concluded that since the Act requires accuracy and integrity in financial reporting at all levels of the corporate structure, including non-publicly traded subsidiaries, then Congress must have intended the employees of non-public traded subsidiaries to be protected by the Act's whistleblower provisions.

In Klopenstein v. PCC Flow Technologies Holdings, Inc. and Allen Parrott, 22004-SOX-11 (ALJ July 6, 2004), the Administrative Law Judge dismissed the complaint for reason that Complainant's employer, a non-publicly traded subsidiary of a publicly traded company, was not a publicly traded company. The Judge agreed with the reasoning in *Morefield*, that employees of non-public subsidiaries of publicly traded companies can be covered by the whistleblower provisions of the Act, but held that in the case before him the Complainant had not filed his complaint against the parent company. "I find the commonality of management and purpose between the two companies sufficient to most likely bestow whistleblower protection upon Complainant had he sued the parent company. He did not however." *Klopenstein, supra,* at 8.

In *Powers v. Pinnacle Airlines, Inc*., 2003 SOX 18 (ALJ, March 5, 2003), the Sabranes-Oxley count in a complaint was dismissed because the employer was not a publicly traded company but rather the subsidiary of a publicly traded company. *Powers* differs from the present case in that the Complainant did not name the parent company in her complaint before OSHA and did not file a motion before the administrative law judge requesting that the parent company be added as an additional party.

Here, Complainant alleges that he suffered retaliation for engaging in activity protected by the Act, and that the retaliatory conduct was the responsibility of his employer, a non-publicly

traded subsidiary, as well as the parent publicly traded company. As the parent company is a respondent in this case and it is determined that Congress intended to provide whistleblower protection to employees of subsidiaries of publicly traded companies, Complainant has set forth a cause of action under the Act sufficient to withstand a motion for summary decision.

Protected Activity

Respondent alleges that the undisputed facts establish that Colonial Bank did not fire Complainant for engaging in activity protected by the Act. In particular, Respondent argues that Complainant was terminated *before* he engaged in protected activity under the Act. However, there is significant dispute over the facts alleged by Respondent as supporting its argument. For purposes of this Motion for Summary Decision, I must accept the facts as alleged by Complainant.

Complainant asserts that two of Respondent's executive employees, Joseph Chillura, Chief Executive Officer for Respondent's Bay Area region, and Alfred Rogers, President of Respondent's Bay Area region, formed a lending company, MCapital II, L.L.C. ("MCapital"), in March 2002,[4] that possibly violated banking laws, fraud against shareholder laws, and violated employment contracts with Respondent that prohibited them from engaging in business in competition with Respondent. Complainant discovered the existence of MCapital in late summer or early fall of 2002.[5]

Lying at the center of this matter are allegations by Complainant that he was discharged in retaliation for reporting the involvement of Chillura and Rogers in MCapital, and that the reporting constituted protected activity. Complainant's communication about the MCapital involvement took two forms. First, Complainant alleges that, from late 2002 until April 2003, he orally communicated his belief of possible violations of banking and mail fraud, or fraud against shareholders, to Rogers and Chillura. Second, Complainant put these concerns in writing and faxed a letter dated May 8, 2003 to Robert Lowder, who is Chief Executive Officer of Colonial Bank and Colonial BancGroup, and Flake Oakley, who is President of Colonial Bank.[6]

Respondent does not dispute that Complainant told Chillura and Rogers to stop doing business through MCapital on two occasions in 2002 and, again, in January 2003.[7] During a conversation with Chillura in April 2003, Complainant reminded Chillura to get rid of MCapital.[8]

In January, 2003, Chillura told Complainant that he would sell MCapital, and between January and March 2003, there were discussions between Chillura and a third person about selling MCapital but that unbeknownst to Complainant, the sale discussions ended sometime between March and April 2003.[9]

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[4] Respondent's *Motion for Summary decision*, ¶ 12 at p. 4.
[5] Respondent's *Motion for Summary decision*, ¶ 14 at p. 4.
[6] Respondent's *Motion for Summary decision*, ¶ 4 at p. 2.
[7] Respondent's *Motion for Summary decision*, ¶ 12 at p. 4.
[8] Respondent's *Motion for Summary decision*, ¶¶ 21 and 22 at p. 5.
[9] Respondent's *Motion for Summary decision*, ¶ 24 at p. 6.

Respondent issued a memorandum on May 5, 2003, to "All Employees" regarding compliance with Sarbanes-Oxley, also known as "the Mandatory Reporting Memo."[10] Shortly thereafter, Complainant prepared the May 8, 2003 letter to Lowder and Oakley advising of possible violations of Sarbanes-Oxley and other banking laws by Chillura and Rogers through their involvement in MCapital.

Respondent argues that Complainant's conversations with and directives to Chillura do not constitute protective activity.

Initially, the Eleventh Circuit Court of Appeals has construed language contained in environmental whistleblower statutes that is similar to the language in the Sarbanes-Oxley Act to the effect that internal complaints made to supervisors and others constitute protected activity. *Bechtel Constuction v. Secretary of Labor,* 50 F.3d 926 (11th Cir. 1995). *See also Hermanson v. Morrison Knudson Corp.*, 1994-CER-2 (ARB, June 28, 1996). In so holding, the court stated that "it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions of federal labor laws" and "[t]his construction encourages . . . concerns to be raised and resolved promptly and at the lowest possible level of bureaucracy, facilitating voluntary compliance . . . and avoiding the unnecessary expense and delay of formal investigations and litigation." Moreover, expressing a concern orally may constitute protected activity so long as the concern expressed is specific to the extent that it relates to a practice, condition, directive, or occurrence. *Williams v. Mason & Hanger Corp.*, ARB Case No. 98-030 (ARB, Nov. 13, 2002). Here, Complainant expressed concerns specifically about MCapital and the involvement of Rogers and Chillura in this lending company while, at the same time, serving as executive officers for Respondent. Complainant specifically advised Chillura and Rogers to shut the company down or sell it.

Respondent maintains that Complainant's conversations with Chillura prior to May 7, 2003 do not qualify as whistleblowing activity under the Act because "when he had the conversations, [Complainant] viewed Chillura as his subordinate." Complainant may have been under the impression that he had "actual" authority over Chillura, but events that transpired in this matter indicate otherwise. Chillura drafted *and executed* the letter terminating Complainant's employment, and it was Chillura who instructed the payroll office to terminate Complainant as of May 9, 2003.[11] These are not dealings typical of a subordinate. No personnel documentation was submitted with the summary decision motion evidencing that Chillura was Complainant's subordinate. As a result, there is a genuine issue of material fact in this regard.

Respondent argues that Complainant did not "provide information" to Chillura about MCapital, as Sarbanes-Oxley requires, because "Chillura already knew about it." While Chillura clearly knew about MCapital as he was a partner of the company, Complainant did advise Chillura to sell or shut down the company because of possible violations of banking and mail fraud laws. This is the type of communication protected by the Act. Also, Complainant voiced concerns over MCapital to or about Rogers as well.

[10] Respondent's *Motion for Summary decision*, Tab A.
[11] Complainant's *Opposition to Motion for Summary Decision*, ¶ 24 at pp. 16-17.

Respondent also argues that Complainant's conversations with Chillura before May 7, 2003 did not constitute protected activity because "he did not have a reasonable belief – or any belief at all – that Chillura and Rogers had committed mail (or wire) or bank fraud." To the contrary, while Complainant testified that did not have sufficient documentation in his opinion to *establish* that securities and shareholder protection laws were being violated by Chillura and Rogers through MCapital, it is evident that Complainant was very concerned about potential violations of the law. This concern is demonstrated through Complainant's multiple conversations with Chillura and Rogers during which he advised that MCapital be sold or closed. Complainant's persistence in this regard over a period of several months lends support to a finding that his concern with MCapital was genuine and that he had a reasonable belief that the MCapital activities of Chillura and Rogers involved misconduct,[12] regardless of whether he could specify specific banking, securities, shareholder, or mail fraud violations. The record clearly does not support a finding that Complainant's believe was unreasonable, particularly in light of his twenty-five years of banking experience, and his knowledge of the dealings of Chillura and Rogers.

Complainant put his concerns into a May 8, 2003 letter to Robert Lowder, who is Chief Executive Officer of Colonial Bank and Colonial BancGroup, and Flake Oakley, who is President of Colonial Bank.[13] In the letter, Complainant states the following[14]:

> You will recall that when (Alfred Rogers) and (Joseph Chillura) assumed their current positions, you gave me 'actual' authority over them. I took the responsibility seriously, and at all times looked out for the Bank's best interests. I was therefore extremely upset when I learned in March of last year, before I assumed supervision over them, Joe and Al had formed a company called MCapital II, L.L.C., that apparently was used to finance several deals last year. I did not have many details, but certainly have enough to fear that this new company, which had not been disclosed to the Bank, could be a competitor for the Bank, and that Joe's and Al's continued participation might create a conflict with their Bank duties. I directed them to shut down or sell the business. They assured me they would do so, and in fact told me the company would be sold to a friend of mine who happens to be a customer and stockholder of the Bank.

Respondent contends that Complainant's job was terminated before Respondents received or were aware of the May 8, 2003 letter, therefore the letter could not have been the reason for the termination. Complainant sent the letter to Lowder and Oakley via facsimile on May 8. Also on this date, Lowder and Chillura "arranged to fly together on the Colonial Bank plane" and Respondent contends that it was during this flight that Lowder instructed Chillura to "put in writing the decision to terminate" Complainant.[15] Lowder also instructed Chillura "not to do business through MCapital anymore."[16]

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[12] Complainant testified by deposition that he told Chillura that, "…you keep following [Rodgers] like that and stuff like that, I said, he's looking for a cell mate." *Complainant's Opposition To Motion For Summary decision*, p. 6 ¶ (c)

[13] Respondent's *Motion for Summary decision*, ¶ 4 at p. 2.

[14] Respondent's *Motion for Summary decision*, Tab G.

[15] Respondent's *Motion for Summary decision*, ¶¶ 68-71 at pp. 14-15.

[16] Respondent's *Motion for Summary decision*, ¶ 72 at p. 15.

Respondent asserts that Lowder did not review Complainant's May 8 letter until May 9.[17] Chillura signed a letter May 9, 2003 terminating Complainant as of that date.[18] The termination letter was mailed on May 12 and received by Complainant on May 13.[19]

However, the record is equivocal regarding whether Lowder and Chillura had knowledge of the contents of the May 8 letter from Complainant by the time Chillura's May 9 termination letter was executed and before the termination letter was mailed.

Respondent also asserts that Chillura verbally fired Complainant during a "lengthy telephone conversation" on April 29, 2003, which predates the May 8, 2003 letter.[20] Complainant disagrees and maintains that Chillura only advised him in that conversation that Lou Prida, a contract consultant for the Bank, was terminated.[21] Contemporaneous written documentation and actions from Complainant during this time period lend support to Complainant's version of the telephone conversation. First, Complainant's May 8 letter mentions only the fact that Complainant felt "personally betrayed by the decision to terminate Lou Prida's consulting agreement, a month after he signed it . . .."[22] Complainant further wrote that "as bad as I feel about what happened to Lou, I now have information which I cannot help but feel sheds light on why Lou was let go" and that the "same information makes me feel it is only a matter of time before I suffer the same fate." Complainant was referencing "blowing the whistle" on MCapital II. It appears from this letter that Complainant was not under the impression that he had been fired. Indeed, earlier that day he had attended the Bay Area Director's Loan Committee meeting of the Bank in his capacity as Chairman of the Advisory Board. There is nothing of record to indicate that his attendance was unwelcome or unexpected because he had been earlier terminated.

Second, there are no personnel records of the Bank indicating that Complainant's employment with the Bank was terminated prior to May 9, 2003. Indeed, Chillura's May 9 letter terminating Complainant provided that the termination become "effective" on that date.[23] Indeed, during her March 2, 2004 deposition, Christina Ford, who was with the Bank's payroll department, testified that Chillura told her by telephone that Complainant's employment with the Bank was terminated effective May 9, 2003.[24]

The May 9, 2003 letter terminating Claimant's employment at the Bank followed on the heels of his May 8 letter. The facts of record are in dispute over whether Complainant was terminated prior to May 8, 2003, and whether Lowder and Chillura knew of Complainant's May 8 letter prior to execution and transmittal of the May 9 termination of employment letter.

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[17] Respondent's *Motion for Summary decision*, ¶ 33 at p. 9.
[18] Respondent's *Motion for Summary decision*, ¶ 75 at p. 15.
[19] Respondent's *Motion for Summary decision*, ¶ 75 at p. 15; Complainant's *Opposition to Motion for Summary Decision*, ¶ 23 at p. 16.
[20] Respondent's *Motion for Summary decision*, ¶ 58 at p. 13.
[21] Respondent's *Motion for Summary decision*, ¶ 60 at p. 13; Complainant's *Opposition to Motion for Summary Decision*, ¶¶ 15 and 16 at pp. 12-13.
[22] Respondent's *Motion for Summary decision*, Tab G.
[23] Complainant's *Opposition to Motion for Summary Decision*, Tab K.
[24] Complainant's *Opposition to Motion for Summary Decision*, ¶ 24 at pp. 16-17.

Thus the record as it presently exists shows that there are genuine issues regarding whether Claimant's communications to Chillura and Rogers during the late 2002 to April, 2003 time period and in the form of the May 8, 2003 letter constitute protected activity and were the cause of retaliatory actions by Respondents. Consequently, summary decision on this ground must be denied.

ORDER

In consideration of the aforesaid, **IT IS HEREBY ORDERED THAT** the Motion For Summary Decision by Respondent, Colonial Bank, is denied.

A
Thomas M. Burke
Associate Chief Administrative Law Judge